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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PAUL JENKINS, PETITIONER

v.

LIFETIME HOAN CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Title VII , would prohibit an employer from hiring a 45 year old woman to replace an older successful 65 year old male if the woman was hired because she is having sex with the covered employer's third party customer representative?

2. What is direct evidence of age discrimination? The Seventh Circuit concluded that statements to a 65 year old successful sales person that he should retire and was considered old fashioned before the 45 year old paramour is hired is not direct evidence of age discrimination. The Sixth Circuit recently noted, "[v]ery few cases exist to provide guidance on direct-evidence analysis in the arena of employment discrimination." *DiCarlo v. Potter*, 358 F.3d 408, 416 (6th Cir. 2004. This is probably because "direct evidence of discrimination - a 'smoking gun' attesting to a discriminatory intent, . . . - is typically unavailable[.]" *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 76 (2d Cir. 2000). *EEOC v. J. Alexander's Rest., Inc.*, 2005 U.S. Dist. LEXIS 44564 (D. Tenn. 2005)

3. Why is it not sex discrimination when a forty-five (45) year old woman is hired and paid more than the 65 year old male that had increased the employer's sales from $3 million to $40 million dollars in sales in less than five (5) years when there is ample evidence that she was hired because she was having sex with the Wal-Mart buyer?

4. In a reverse sex discrimination case is the Plaintiff required to adduce only background circumstances

to support the suspicion that the defendant is that unusual employer who discriminates against the majority? *see Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) (quotations, citations omitted), see also *Bishopp v. District of Columbia*, 252 U.S. App. D.C. 156, 788 F.2d 781, 786 (D.C. Cir. 1986) ("A plaintiff's minority status by itself is sufficient in light of historical practice in the workplace toward such socially disfavored groups to give rise to an inference of discriminatory motivation. While white males, who as a group historically have not been hindered in the workplace because of their race or sex, are required to offer other particularized evidence, apart from their race, sex, that suggests some reason why an employer might discriminate against them." *Duffy v. Wolle*, 123 F.3d 1026, 1036 (8th Cir. 1997) Or must the Plaintiff also adduce background and something fishy as suggested by the D.C. Circuit which requires: "evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against whites [or men]," and "evidence indicating that there is something 'fishy' about the facts of the case at hand." *See Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993)

5. In an employment discrimination case, is it error to grant a Rule 56 summary judgment motion when the summary judgment evidence demonstrates equally plausible factual inferences from proven facts, being either discrimination or no discrimination, especially when the employer's affiants have demonstrated inconsistent positions regarding the stated reason for discharge and the

affidavit assertions are belied by the employer's own documents, thereby at least establishing the requisite suspicion of mendacity?

6. Does the Seventh Circuit's opinion in *Jenkins* which resolves credibility issues in favor of the movant-employer (by explaining the inconsistencies away as unsupported by the record [there was support] or so trivial as to be immaterial), ignore this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) which: (1) clearly places credibility determinations within the province of the fact-finder; (2) permits the fact-finder to infer the ultimate finding of unlawful discrimination based on the *prima facie* case combined with sufficient evidence of the falsity of the stated reason for the employment action and (3) requires no additional independent evidence of discrimination?

7. Whether the Seventh Circuit comports with this Court's rulings in *Reeves v. Sanderson Plumbing Products, Inc.*, *Anderson v. Liberty Lobby, Inc.*, and *Lytle v. Household Manufacturing, Inc.*, inasmuch as in this case, the Seventh Circuit made credibility determinations, weighs evidence, performs functions of the fact-finder and when weighing the evidence concludes the evidence is non-existent, conclusory, subjective belief and non-probative without any explanation and not referencing any of the evidence offered in opposition?

8. In the summary judgment matrix, should the circuit courts, which reject the non-movant evidence be required to articulate the evidence offered by the non-movant and the reasons for the conclusion the non-movant evidence is so weak it could never be probative of unlawful discrimination, in other words, should the trial court and / circuit court set out the evidence offered by the non-movant and state why the evidence is not material or so weak it could never raise a material issue of fact?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 4

REASONS FOR GRANTING THE PETITION 17

CONCLUSION 21

APPENDIX

Circuit Court Opinion 1a
District Court Order 11a

TABLE OF AUTHORITIES

Page

CASES

HARDING V. GRAY, 9 F.3D 150, 152-53 (D.C. CIR. 1993) 18
HONOR CENTER V. HICKS, 509 U.S. 502, 517, 113 S.CT. 2742, 125 L.ED.2D 407 (1993) 20
MCDONALD V. SANTA FE TRAIL TRANSP.CO., 427 U.S. 273 (1976) 17
MILLS V. HEALTH CARE SERV. CORP., 171 F.3D 450, 455 (7TH CIR. 1999) 18
NOTARI V. DENVER WATER DEPT., 971 F.2D 585, 589 (10TH CIR. 1992) 18
REEVES V. SANDERSON PLUMBING PRODUCTS, INC., 530 U.S. 133, 120 S.CT. 2097, 147 L.ED.2D 105 (2000) 21
TAKEN V. OKLAHOMA CORP. COMM'N, 125 F.3D 1366 18

STATUTES

29 USCS §§ 621 3
42 U.S.C. § 2000e-2 2

RULES

FEDERAL RULE OF CIVIL PROCEDURE 56 1

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirmed the decision of the United States District Court for the Northern District of Illinois, Eastern Division, which granted summary judgment in favor of the Respondent.

JURISDICTION

This Petition for a Writ of Certiorari seeks review of the opinion of the United States Court of Appeals for the Seventh Circuit entered on January 8, 2008.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

RELEVANT PROVISIONS INVOLVED

Federal Rule of Civil Procedure 56

> **Rule 56. Summary Judgment**
>
> . . . .
>
> **(c) Motion and Proceedings Thereon.** . . . . The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law. . . . .

. . . .

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by deposition, answers to interrogatories or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise specified in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

42 U.S.C. § 2000e-2. Unlawful Employer practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to

discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

29 U.S.C. §621, Age Discrimination Employment Act of 1967

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act [29 USCS §§ 621 et seq.;] to promote employment of

older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

STATEMENT

This is a gender/age discrimination case. The case was filed on December 9, 2005, a jury was demanded and discovery proceeded. The defendant filed a motion for summary judgment on September 22, 2006, to which the plaintiff responded on October 6, 2006. By order dated November 29, 2006, George W. Lindberg, U.S. District Judge for the Northern District of Illinois granted defendant's motion. (A 1-2). The district court entered final judgment on November 29, 2006 (A 3), The plaintiff filed his notice of appeal on December 28, 2006. The parties filed their brief, the case was then argued October 7, 2007. The United States Court of Appeals for the Seventh Circuit issued its opinion January 8, 2008.

STATEMENT OF FACTS

This is an un-classic case of reverse gender and age discrimination in which a 45 yr old woman (Barbara Conklin) gets a job, which was impeccably performed by a 65 year old man (Paul Jenkins), Conklin was paid more money than Jenkins; she is younger and is having sex with Lifetime's customer representative (Bill May V.P. Wal-Mart) to whom Jenkins had been selling Lifetime's products for many years.

PAUL JENKINS AND LIFETIME

Jenkins was born February 28, 1937. For 25-30 years, Jenkins was involved in the sale of house wares of varying kinds to Wal-Mart. Jenkins began to call on Wal-Mart, when Sam Walton was still associated with company. Over the years, Jenkins developed a long standing relationship with everyone at Wal-Mart.

In the years prior to Jenkins commencement of employment with Lifetime, Jenkins sold kitchen gadgets from Robinson Knife Company to Wal-Mart. While working for Robinson Knife, Jenkins would commonly see sales representatives from Lifetime such as Evan Miller (V.P. sales) attempting to sell Lifetime's house wares to Wal-Mart.

During the period of time that Jenkins was calling on Wal-Mart, but prior to his commencement of employment with Lifetime, Jenkins noted associates from Lifetime who were unable to sell to Wal-Mart. Ultimately; Lifetime hired Jenkins in hopes of providing some inroad into the Wal-Mart business. During the 2-3 years prior to Jenkins commencement of employment at Lifetime Jenkins was regularly solicited by Evan Miller to work for Lifetime. Miller told Jenkins of Milton Cohen's (then president and CEO of Lifetime) interest in having Jenkins work for them. Ultimately Jenkins reached a written agreement with Lifetime to begin employment in August of 1996. Mr. Cohen retired before Jenkins demotion and termination.

Jenkins's Background and Qualifications

At the time that Jenkins first began employment with Lifetime; Lifetime's sales volume was approximately 3 million dollars a year to Wal-Mart and consisted only of cutlery. The first year after Jenkins began his employ with Lifetime, Jenkins increased sales to Wal-Mart, from 3 million dollars a year to 13 million dollars. Each successive year, Jenkins increased the sales to Wal-Mart. In fact, in the year 2002 Jenkins had increased Lifetime's sales to Wal-Mart to 40 million dollars. Those 40 million dollars in sales totaled approximately 1/3 of Lifetimes gross sales for the year.

After Jenkins began working for Lifetime, he moved from Illinois, to the state of Arkansas to be closer to his sales contacts at Wal-Mart. Jenkins did that so as to maximize his ability to call on Wal-Mart. Jenkins was one of the first vendors calling upon Wal-Mart to open a showroom/office close to Wal-Mart so their buyers could see Lifetime's products and have regular meetings. Thereafter many vendors who sold to Wal-Mart implemented the same concept of storefront offices as Jenkins had done.

Later, Jenkins son, Jeffrey Jenkins, was approaching graduation from college and he was hired by Lifetime. At the time Lifetime hired Jenkins son, Miller and Cowan stated that they wanted Jenkins replacement to be in place when Jenkins ultimately chose to retire. Jeff Jenkins was following in Jenkins footsteps and would also call on Wal-Mart for Lifetime. In fact at one point after Jenkins contract expired and Jenkins approached Miller about a new agreement,

Miller told Jenkins that it was not necessary in as much as Jenkins "was family".

Barbara Conklin the New Replacement

In June/July of 2002 Jenkins and his son were invited to Westbury, New York (Lifetime's home offices) for a summer planning session or at least Jenkins was led to believe that was the case. On that occasion Dennis Reeves (a former Wal-Mart V.P.) was present and was represented as being a consultant retained to increase Lifetime sales to Wal-Mart. Reeves made a presentation in the presence of Jenkins, Jenkins son, Miller and Jeffery Segal (new president) where Reeves maintained that a person named Barbara Conklin somehow could obtain 8 feet of house ware peg/shelf space in the Wal-Mart stores. Jenkins was dumbfounded by the statement. As Jenkins knew, no vendor in the history of Wal-Mart had occupied 8 feet of shelf space. Conklin at the time was still employed by World Kitchen, a competitor, who had filed for bankruptcy relief in May of 2002.

During this meeting no criticisms of Jenkins sales ability were made other than somehow Jenkins should magically be able to obtain something that Wal-Mart has historically never provided a single vendor, i.e. 8 feet of shelf space.[1]

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[1] Reeves later in a memo referred to Jenkin as being old fashioned.

Jenkins knew little of Conklin. Reeves, stated in his deposition that because Conklin allegedly oversaw a large business where she was employed (World Kitchen) that she somehow would be a great sales person or more able to sell Wal-Mart. In fact Reeves later admitted he knew very little of Conklin's sales ability. Conklin principally sold Corning Ware while at World Kitchen. Corning Ware is such a common commodity that most every household that has a microwave or an oven will have some. As Jenkins stated; a chimpanzee could sell it.

Also, before Conklin came to Lifetime and while Jenkins was competing with her, she was not able to sell any cutting boards to Wal-Mart. Jenkins was number 1 in cutlery and cutting boards sales to Wal-Mart. When Conklin was with World Kitchen, World Kitchen had purchased Ecko products, which was the largest kitchen gadget vendor in the world and at that time was number one in kitchen gadgets sales to Wal-Mart. However, after the purchase and with Conklin in charge, Ecko lost market position at Wal-Mart. When Jenkins came to Lifetime, Lifetime never even sold kitchen gadgets to Wal-Mart and Jenkins was able to take Lifetime from nothing to number three in sales to Wal-Mart. Also, when Conklin and Jenkins were competing, prior to her engagement with Lifetime, Jenkins was number 1 in cutlery and cutting boards sales to Wal-Mart. Conklin sold cutlery and cutting boards for World Kitchen but was unable to sell any cutting boards to Wal-Mart. After the meeting where Conklin was mentioned, Miller asked Jenkins if he thought that Conklin would be a good fit for the Wal-Mart team. Jenkins suggested that any assistance would be gladly appreciated and accepted. Miller never

told Jenkins that Conklin when hired would take Jenkins job.

JENKINS'S SALES PERFORMANCE

According to the Lifetime Brands 10K filings, in the years 2000, 2001, 2002, Jenkins sales to Wal-Mart accounted for 12% of net sales in the year 2000, 18% of net sales in 2001, and 20% of net sales in 2002. No other customer other than Wal-Mart accounted for 10% or more of the Lifetime's net sales during those calendar years. Evan Miller sold to Target and other large retailers but never achieved Jenkins level of sales. Also during the year 1997 15 % of Lifetime's net sales were to Wal-Mart. In 1998 17% of all net sales were to Wal-Mart and in 1999 14% of Lifetime's sales were to Wal-Mart. No other customer accounted for 10% or more of Lifetime's net sales for the calendar years 97, 98, or 99.

The only reason Jenkins's sales to Wal-Mart were not as significant in 1999 and 2000 was because Lifetime had acquired a new warehouse and also changed their inventory system. When Lifetime changed their inventory system and their warehousing arrangement, shipments would often not be made in a timely fashion. That was no fault of Jenkins. Wal-Mart is known to fine any vendor that does not ship 98% of an order on order date. In fact Evan Miller voluntarily paid a $50,000.00 fine to Wal-Mart, against Jenkins advice, thinking he would aggrandize the buyer despite Jenkins contrary advice. Of course the buyer gladly took the money and bought no more from Miller. Jenkins explained to Miller the avenues and a method by which avoidance of the fines could be made, but apparently Miller was unwilling to listen. In essence

Miller (age 36) was unwilling to accept sage advice from an older person.

With the tremendous problems in Lifetime's shipping and inventory system, at times it was difficult for Jenkins to continually repair Lifetime's relationship with Wal-Mart. On one occasion Jenkins sold a product that Miller had told Jenkins would be available. When ship date came, Miller for the first time advised Jenkins that manufacture of the item had not even commenced. Jenkins was able to avoid a hefty fine and loss of the shelf space on that kitchen gadget.

Any time a supplier, like Lifetime, cannot perform at the required Wal-Mart standards; the volume done with that supplier is reduced to the level where the supplier can achieve the standard. This was a very significant issue for Lifetime through no fault of Jenkins. Dennis Reeves posed the question: Even if Wal-Mart opened the door for increased business from Lifetime, could Lifetime execute?

Conklin's relationship with the Wal-Mart V.P., Bill May

Although Jenkins was number one in sales of cutting boards and cutlery to Wal-Mart, Conklin nevertheless was "category manager "over those two categories. A vendor to Wal-Mart will become a category manager of a product at Wal-Mart when the vendor is number one in sales. Jenkins had mentioned this peculiarity to May before Conklin was hired by Lifetime. May never did address the issue. In fact Conklin could not sell a cutting board to Wal-Mart when she was with World Kitchen and nevertheless

was somehow category manager for cutting boards. A category manager has access to the sales volume of all other suppliers of the category of which they are manager. In other words Conklin knew all of Jenkins sales volume but not the sales price. Even equipped with that information Conklin was not able to sell either cutlery or cutting boards to the level of her competitor, Jenkins. Jenkins was clearly, if anyone looked at the sales data, outselling Conklin.

Direct Evidence of Discrimination

Conklin was hired to work at Lifetime on August 26, 2002. After hiring, Conklin immediately began to criticize Jenkins. Conklin claimed Jenkins needed to learn to email. Jenkins never had an email address while employed at Lifetime, or at least that Jenkins was ever apprised of. Conklin then on November 2002 wrote a memo to Miller suggesting Jenkins should retire because of his lack of computer skills. Wal-Mart never communicated with Jenkins by email. In fact, Jenkins did not even own a computer.

Jenkins is told to retire and Conklin replaces him.

In December 2002 Jenkins was called to Westbury, New York, Lifetime's office for discussions. During that meeting Miller told Jenkins, he should retire.[2] After Jenkins challenged the suggestion, he stated he had no intention of retiring. Miller then maintained that Jenkins should learn the computer. Bob Reichenbach (V.P. Cutlery & Bake Categories) was also present at the meeting and stated that Jenkins

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[2] *Miller denied he ever told Jenkins he should retire.*

was the best sales person Lifetime had ever employed. After that meeting Jenkins emailed Reichenbach and Miller and advised them that Jenkins was willing to learn the computer. Reichenbach responded favorably. Miller did not respond.

The reason for removing Jenkins from the Wal-Mart account and his replacement by younger less qualified females

In January of 2003 Jenkins was telephoned by Miller and told that he would no longer be permitted to call on the Wal-Mart account. Miller gave Jenkins no reason for the change. Jenkins had just completed the highest level of sales that Lifetime had ever made to Wal-Mart in the history of the company. Jenkins had also recently introduced a new Lifetime line of Kitchen Aid gadgets to Wal-Mart. Jenkins had initially persuaded the Wal-Mart buyer permit Lifetime to place Kitchen Aid gadgets in three hundred stores. After more negotiations Jenkins managed to place Kitchen Aid products in 700 Wal-Mart stores rather than 300 stores.

Jenkins demotion and termination

In January of 2003 after Jenkins was told he would no longer call on Wal-Mart, Jenkins asked what he would be doing and was told by Miller that Lifetime had not decided yet.

Jenkins then attended a house ware show in Chicago in January of 2003 following his demotion. When Jenkins went to the house ware show with his son and daughter-in-law in January of 2003 he was

treated by the Lifetime people (Evan Miller, Jeff Siegel and Larry Sklute) as if they did not know Jenkins. At the convention in Chicago, of course Conklin was there with May. May made a comment to Jenkins, that Jenkins had so much money he should just retire.

Between August of 2002 and December of 2002 when Barbara Conklin came to the Bentonville Arkansas, she would commonly be seen with May wearing very short skirts and very revealing blouses. That is to say that she would be scantily clad and would be interacting with May as if they were lovers.

When Jenkins was assigned to selling closeouts, his salary dropped from three hundred thousand per year to sixty thousand per year. Jenkins was told to call on accounts that were all either on the east coast or the west coast. One of the 8 entities was in Tennessee but Jenkins was told to concentrate on Florida and North Carolina first. Jenkins had to ask for a company credit card and travel reimbursement. Jenkins was also told to communicate with these accounts by email.[3] Jenkins did not have a computer. After Jenkins requested a computer, finally a computer was sent to Jenkins which was so old it would not even work. Jenkins son, Jeff, attempted to boot the computer and it took an hour to boot.

While working in close outs, Allen Goldberg became Jenkins new supervisor. Each time Goldberg would call Jenkins, he would tell Jenkins that he was sorry for what he was doing. It was obvious to Jenkins from Goldberg's words that Goldberg was doing the

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[3] The Seventh Circuit found Jenkins was not required to use email.

dirty work of Miller.[4]

In March or April of 2003 Jenkins requested samples of the close out items so that Jenkins could sell or understand what it was he was expected to sell. Then Jenkins was placed on 2 weeks of probation and Jenkins received one or two samples of close out items.[5] After Jenkins was placed on 2 weeks probation in May, 2003 which was the approximate date that the $40MM Wal-Mart orders Jenkins consummated in December 2002 would ship, Jenkins was then told that he must give a list of his appointments with prospective customers. Jenkins was told that he must give a list of appointments even though Jenkins had not received samples, did not know what he was expected to sell and had never meet the customers who he was to call on. Jenkins had asked Goldberg for introductions to the close out buyers, which Goldberg declined to do. Jenkins was fired from Lifetime on May 23, 2003.

Jenkins' Replacements

In answers to interrogatories Lifetime admitted that Jenkins job responsibilities when he called on Wal-Mart were assumed by two people; Barbara Conklin and Julie Fidler. Conklin was clearly younger than Jenkins at the time of Jenkins demotion

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[4] In fact, interrogatory answers state that each decision that adversely affected Jenkins employment with Lifetime was made by Miller. Miller in his deposition claimed he did not recall how the decision was made to remove Jenkins from the wal-Mart account.

[5] Reportedly there were thousands of items that were close outs.

in 2003. Conklin was 45 years of age at the time she began with Lifetime, making her 20 years younger than Jenkins. Fidler was hired January 10, 2003 and was paid $150,000 in salary. Her date of birth is June 26, 1970. At the time of her hire, Fidler was 32 years of age. It required two younger women to assumed the roles previously performed by Jenkins alone. With Jenkins' demotion in January 2003 and Fidler's hiring, the sales team grew to 4 team members.[6]

After discovery of Conklin's sexual relationship with Bill May, Lifetime pays Conklin $10,000.00 per month for 24 months along with $1,200.00 per month for COBRA reimbursement

Conklin, May and Miller all claimed in their depositions that the relationship between May and Conklin had ended before Conklin began her employ with Lifetime. Miller claimed Lifetime was unaware of the relationship until after Conklin's termination. After Conklin and May were deposed, Jenkins obtained an email exchange between May and Conklin, from Wal-Mart which confirmed the relation ship was ongoing in July 2002 when Conklin was interviewing with Lifetime.[7] In fact aside from the "I love you" remarks, May was advising Conklin to ask for the moon in salary negotiations with Lifetime. May had claimed in his deposition he was not aware Conklin was interviewing

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[6] Conklin lived in Houston and traveled to Bentonville, Arkansas, thereby increasing the cost of sales.

[7] Wal-Mart discovered the relationship by scanning May's laptop and discovered emails confirming an ongoing affair. Wal-Mart terminated May for his ongoing relationship with Conklin

with Lifetime. Conklin likewise claimed the same.[8] The emails received from Wal-Mart demonstrate Conklin and May are mendacious. Wal-Mart discovered the relationship between May and Conklin in June of 2003 and fired May for the breach. May was fired because of the ***ongoing affair***, not that it had existed in the past. Thereafter Lifetime stated to Wal-Mart that Conklin resigned to spend time with her family.

BACKGROUND FISHY FACTS

Barbara Conklin was paid a one hundred thousand guaranteed bonus of the first year, 2002-2003 after hire by Lifetime. Conklin claimed the reason she received the $100,000 was because had she remained with World Kitchen, she would receive the same amount as part of the Plan of Reorganization of World Kitchen. The World Kitchen Plan of Reorganization does not provide for bonus to any former employee. In fact the plan of reorganization did not even come into effect until September of 2002 after Conklin began her employ at Lifetime.

Conklin's employment agreement with Lifetime also contains a provision for a forty five thousand dollar bonus in the event that World Kitchen emerged from bankruptcy. Conklin was also paid that bonus from Lifetime. Both Conklin and Miller claimed no knowledge of such a provision in the employment agreement. Conklin's employment agreement provided that in the event she were terminated or resigned she would receive nothing. Nevertheless Lifetime paid

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[8] Conklin spoke with May on the telephone before her deposition to discuss what May said in his deposition.

Conklin ten thousand dollars a month after her discharge/resignation for two years, in addition to twelve hundred dollars a month in Cobra reimbursement, for 18 months. Miller's reason for the exorbitant payments was: "we just thought it was a good way to end." The agreement required Conklin to keep the agreement confidential. Miller claimed in the face of these exorbitant payments that he took the word of Conklin that her relationship with May had ended before she was hired. A jury could easily conclude the facts are so fishy that Lifetime had hired Conklin because they knew of the relationship with May and plied May with sex to increase sales. Also, Miller when deposed claimed he could not recall why he decided to demote Jenkins.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit has opined that it is not a violation of Title VII when a woman is hired to replace an exemplary male employee even if the woman is hired to replace the male employee because the woman is having sex with the subject employer's customer. This flawed reasoning concluded women would be just as disadvantaged as a man by that type of favoritism.

As this Court noted in *McDonald v. Santa Fe Trail Transp.Co.*, 427 U.S. 273 (1976) Title VII must be applied alike to all employees. Id 283. The flawed reasoning rewards mendacious employers who could blatantly fire male employees and replace them with women hired to ply sexual favors to customers.

Contrary to the Seventh Circuits opinion, the question is not who potentially would be affected; but who the actual victim of the discrimination was.

II. The Seventh Circuit's opinion demonstrates the split among the Circuits when addressing reverse discrimination claims.

Some Circuits suggest that one option is to simply drop the first prong of the elements of a prima facie case. On the other hand, at least two circuits use a different standard in "reverse discrimination" cases. *See Taken v. Oklahoma Corp. Comm'n*, 125 F.3d 1366, 1369 (10th Cir. 1997); *Harding v. Gray*, 9 F.3d 150, 152-53 (D.C. Cir. 1993). Those cases operate from the premise that "invidious discrimination against white [men] is relatively uncommon in our society, and so there is nothing inherently suspicious in an employer's decision to promote a qualified minority [or female] applicant instead of a qualified white [male] applicant." *Harding*, 9 F.3d at 153. This approach has also been justified because the presumption that arises once the *McDonnell Douglas* prima facie test is met--that unless otherwise explained discrimination is more likely than not the reason for the challenged decision-- is "not necessarily justified when the plaintiff is a member of an historically favored group." *Notari v. Denver Water Dept.*, 971 F.2d 585, 589 (10th Cir. 1992). *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 455 (7th Cir. 1999) Thus, these circuits have modified the prima facie test and added various substitutes (referred to as "background circumstances") for the burden imposed on minority or women plaintiffs to show that they are members of a protected class. The background

circumstances analysis was demonstrated here by Jenkins, yet never became part of the opinion. The Circuit Court opinion never mentions that Conklin and May falsely maintained the affair had ended before Conklin was hired by Lifetime. The Circuit opinion also never mentions the plush dowry Conklin was paid post termination of May. The Circuit Courts should be required to recite the non-movant's evidence and state why it fails to raise a material issue of fact.

The Seventh Circuit opinion confounds the definition of direct evidence.

Even though few cases may exist regarding direct evidence as opposed to circumstantial evidence cases, it is clear that there are issues of fact in this case with respect to why Jenkins was demoted. He was told to retire by Miller after the mendacious Conklin wrote to Miller. He was referred to as old fashioned. He was demoted by Miller days after he was told to retire by Miller. That should be direct evidence.

The Seventh Circuit did not recite the evidence in the light most favorable to the non-movant.

As this Court held in *Reeves*, "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves* at 530 U.S. at 148, 120 S.Ct. at 2109. This Court previously reasoned that "the fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by suspicion of mendacity), together with the elements

of the *prima facie* case, may suffice to show intentional discrimination." *Reeves*, 530 U.S. at 147, 120 S.Ct. at 2108, *citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 517, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Further, "rejection of the Defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . [and] '[n]o additional proof of discrimination is *required*." (emphasis in original) *St. Mary's*, 509 U.S. at 511, 113 S.Ct. at 2747-50; *see also Reeves*, 530 U.S. at 147, 120 S.Ct. at 2108. This Court made it clear that proof of the falsity of the employer's stated reason for the adverse employment action is a form of circumstantial evidence that is probative of intentional discrimination. *Reeves*, 530 U.S. at 147; 120 S.Ct. at 2108, *citing St. Mary's*, 509 U.S. at 517, 113 S.Ct. 2742. Here when questioned how the decision was reached, to remove Jenkins from the Wal-Mart account Miller claimed he could not recall. As such, Lifetime never shifted the burden of persuasion.

In reiterating the *St. Mary* standard, this Court in *Reeves* recognized that there may be some instances where no rational fact-finder could conclude that discrimination occurred even when a *prima facie* case has been established and there is sufficient evidence to reject the stated explanation. *Reeves*, 530 U.S. at 148, 120 S.Ct. at 2109. For instance: (1) if the record revealed as a matter of law some nondiscriminatory reason for the decision; or (2) if the employee created only a weak issue of fact as to the falsity of the employer's explanation and there was "abundant and uncontroverted **independent** evidence" that no discrimination occurred. *Id.* (Emphasis added) *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133,

120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Here there were no such gaps in the evidence. Miller paid Conklin over $250,000.00 post termination for her silence about the reason she was hired. A jury could easily conclude Conklin was hired because of her gender notwithstanding Jenkins stellar performance. The Circuit Courts and trial courts should be required to recite only the evidence of the non-movant and state why it fails muster.

CONCLUSION

The *Jenkins* opinion exemplifies the need for guidance for courts to follow in determining which claims are appropriate for summary judgment in an employment discrimination case. Far from a fact specific ruling, the *Jenkins* opinion is clearly an aberration from the accepted and usual standards in a summary judgment proceeding found in Rule 56. Further, the opinion deviates from this Court's decision in *Reeves*, and leaves uncertain the role of the trial courts in evaluating evidence and making credibility assessments. Left in obscurity is the amount of proof required by the nonmovant-employee to defeat summary judgment and the question of whether *Reeves* requires a review of the entire record from the non-movant in the most favorable light, drawing all reasonable inferences in favor of the non-moving party, but making no credibility determinations or weighing any evidence. *Id.*

To provide some vitality to the concept of *stare decisis*, some level of predictability to employee/employer rights, review by this Court is

warranted.

Respectfully submitted,
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No. 06-4427

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PAUL JENKINS,
Plaintiff-Appellant,

v.

LIFETIME HOAN CORPORATION,
Defendants-Appellee.

October 2, 2007, Argued

January 8, 2008, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 05 C 7113. George W. Lindberg, Judge.

COUNSEL: For PAUL JENKINS, JR., Plaintiff - Appellant: John E. Wall, Jr., Dallas, TX.

For LIFETIME HOAN CORPORATION, Defendant - Appellee: Angela P. Obloy, VEDDER, PRICE, KAUFMAN & KAMMHOLZ, Chicago, IL USA.

JUDGES: Before Hon. FRANK H. EASTERBROOK, Chief Judge, Hon. DANIEL A. MANION, Circuit

Judge, Hon. ANN CLAIRE WILLIAMS, Circuit Judge.

OPINION

ORDER

Paul Jenkins sold housewares to Wal-Mart for Lifetime Hoan Corporation, but was ultimately discharged. He then sued Lifetime claiming discrimination on the basis of sex and age. The district court granted Lifetime's motion for summary judgment on both theories of discrimination, and Jenkins now appeals. We affirm.

In July 1996 Lifetime hired Paul Jenkins, who was 59 years old at the time, to sell housewares to Wal-Mart. When Jenkins began his employment, Lifetime sold approximately $ 3 million worth of merchandise per year to Wal-Mart, but during the next seven years, Jenkins steadily increased Lifetime's sales to Wal-Mart to approximately $ 40 million.

In August 2002 a former Wal-Mart vice-president recommended that Lifetime hire Barbara Conklin, who was 45 years old and a salesperson from a competing company. Lifetime accepted this recommendation and hired Conklin to be the Wal-Mart team leader. According to Jenkins, once hired, Conklin immediately began to criticize him for his lack of computer skills. Conklin demanded that Jenkins communicate via email, though Jenkins claims he did not have a computer or an email address. At the time, Jenkins's son, also a Lifetime employee, would check Jenkins's email for him and respond as necessary. Conklin also began to implement changes encouraging employees to use a

computer program that enabled sales to be made based on a better understanding of Wal-Mart's needs and consumption patterns.

Then, in October 2002 Conklin sent a memorandum to Evan Miller, the vice-president at Lifetime and Jenkins's supervisor, recommending that Jenkins be "reassigned or retired from the Wal-Mart Account." Two months later, Miller told Jenkins that he had to learn how to use the computer, and according to Jenkins, asked him, "Why don't you think about retiring?"

In January 2003 Jenkins attended a housewares convention in Chicago where he met Bill May, a vice-president at Wal-Mart, who allegedly told Jenkins, "Oh, you don't need any money. You should retire." Then, in that same month, Lifetime removed Jenkins from the Wal-Mart account and transferred him to selling close-outs, which are damaged products others have been unable to sell. This new position did not require the use of email, and his salary, including bonuses, dropped from $ 300,000 per year to $ 60,000 per year.

Upon reassigning Jenkins to sell close-outs, Lifetime gave him lists of potential clients and products to sell, but he could not make a sale. According to Jenkins he was unable to make a sale because Lifetime never gave him samples of the close-outs, despite the fact that he requested them. Jenkins's supervisor contended that Jenkins did not need samples of the close-outs to make a sale. The supervisor further maintained that he had several phone conversations with Jenkins to explain what the procedure would be for selling close-outs. Nevertheless, during the first five months at this

position, Jenkins did not make a single sale or appointment to sell close-outs.

Lifetime then placed Jenkins on two weeks' probation and told him that it would terminate his employment if he did not show improvement. On May 23, 2003, Lifetime terminated Jenkins without giving him a severance package. According to Lifetime, Jenkins's responsibilities were assumed by Conklin and another female employee who was 32 years old at the time.

After Jenkins was terminated, he learned that Conklin had been having an affair with May, the vice-president at Wal-Mart who allegedly told Jenkins he needed to retire. Jenkins argues that Lifetime knew about the affair when it hired Conklin, but Conklin told Lifetime that the affair had ended prior to her taking the position. Some evidence, however, shows that Conklin lied about when the affair ended. In any event, Conklin left Lifetime in August 2003, though the parties dispute whether Lifetime terminated Conklin or whether she quit. Either way, Conklin received a generous severance package, which included monthly stipends of $ 10,000 for two years.

In December 2005 Jenkins filed suit, claiming that Lifetime discriminated against him on the basis of age and sex in violation of the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964. After a significant amount of discovery, Lifetime moved for summary judgment, which the district court granted. The district court found that there was no direct evidence of discrimination and that Jenkins had failed to show that Lifetime's legitimate non-discriminatory reason for terminating him was

pretextual.

Jenkins contends that the district court improperly granted Lifetime's summary-judgment motion. We review the district court's grant of summary judgment de novo. *Sartor v. Spherion Corp.*, 388 F.3d 275, 277 (7th Cir. 2004). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Jenkins first argues that the district court should not have granted summary judgment on his claim of sex discrimination. Jenkins maintains that Miller treated Conklin more favorably because of her sexual relationship with a vice-president at Wal-Mart. But even if Miller favored Conklin due to this relationship, it would not constitute discrimination against Jenkins because of his sex. As we have held, "A male executive's romantically motivated favoritism toward a female subordinate is not sex discrimination even when it disadvantages a male competitor of the woman." *Preston v. Wis. Health Fund*, 397 F.3d 539, 541 (7th Cir. 2005). A woman would be just as likely as a man to be disadvantaged by this type of favoritism. *Id.* The same principle applies here because any alleged favoritism to Conklin because of her relationship with May would have equally disadvantaged a man or a woman in

Jenkins's position. Jenkins just happened to be a man. Therefore, the grant of summary judgment on the sex-discrimination claim was proper.

Turning to the age claim, Jenkins argues that the district court failed to consider his direct evidence of age discrimination. Although it appears that the district court did not consider Jenkins's alleged direct evidence, that error is harmless because Jenkins's evidence is insufficient to survive a motion for summary judgment. *See Davis v. Con-Way Transp. Central Express, Inc.*, 368 F.3d 776, 782 n.3 (7th Cir. 2004). Jenkins argues the district court ignored three remarks that allegedly show discrimination: (1) May's suggestion that Jenkins retire; (2) Conklin's suggestion that Jenkins be retired from the Wal-Mart account; and (3) Miller's remark in December 2002 that Jenkins should retire. To constitute direct evidence, these remarks must essentially amount to "an admission by the decision-maker that his actions were based upon the prohibited animus." *Rogers v. City of Chi.*, 320 F.3d 748, 753 (7th Cir. 2003). None of the alleged remarks meet this requirement.

First, May's remark is irrelevant because not only was he not Jenkins's supervisor, but he did not even work at Lifetime. *See Rozskowiak v. Vill. of Arlington Heights*, 415 F.3d 608, 612 (7th Cir. 2005) (holding that remarks made by someone uninvolved in making employment decisions do not constitute direct evidence of discrimination). Second, even if the court construes Conklin's remark about Jenkins being "retired from the Wal-Mart account" as a comment on Jenkins's overall retirement, it would be insufficient to establish direct evidence of age discrimination because an employer's

"suggestion of retirement would not alone give rise to an inference of discrimination." *Kaniff v. Allstate Ins. Co.*, 121 F.3d 258, 263 (7th Cir. 1997) (suggesting retirement, even when combined with other critical remarks, is not sufficient to constitute direct evidence of discrimination); *Pitasi v. Gartner Group, Inc.*, 184 F.3d 709, 714-15 (7th Cir. 1999) (commenting about early retirement is not direct evidence of discrimination). Finally, Miller's suggestion that Jenkins retire is insufficient to constitute direct evidence of discrimination for the same reason.

Jenkins also argues that he provided indirect evidence of age discrimination. Jenkins was replaced by Conklin, who was 45 years old at the time, and another employee who was 32 years old. A plaintiff proceeding under the indirect method of proving discrimination must show that he was meeting his employer's legitimate expectations, and Jenkins has failed to meet that burden. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 860 (7th Cir. 2007). Although Jenkins states that he was qualified for the job, he never disputes Lifetime's evidence that he refused to use email, did not comply with procedures for submitting appointment lists, and did not make any appointments during five months in his new assignment. Jenkins argues that his inability to make sales appointments was excusable because he had not been provided with adequate information regarding the close-outs. But that is insufficient to establish that Jenkins was meeting Lifetime's legitimate expectations because it does not refute Lifetime's assertion that Jenkins refused to use email, did not comply with company procedures, and did not make any

appointments. *See Burks v. Wis. Dep't of Transp.*, 464 F.3d 744, 753 (7th Cir. 2006) (holding that employee's evidence that he finished assignments failed to refute employer's evidence that employee did not timely complete assignments). Because these facts are undisputed and because there is no dispute that these are legitimate expectations, Jenkins has failed to make a prima facie case and cannot prove age discrimination using the indirect method.

This is enough to decide this case. But even if Jenkins could prove that he was meeting Lifetime's expectations, summary judgment would still be appropriate because he produced no evidence that Lifetime's asserted non-discriminatory reason for transferring him to a new position and terminating his employment was pretextual. In evaluating whether an employer's proffered reason is pretextual, this court's "inquiry is limited to whether there is a material factual dispute as to whether the employer honestly believed the stated, legitimate reasons for the adverse action." *Ptasznik v. St. Joseph Hosp.*, 464 F.3d 691, 697 (7th Cir. 2006).

According to Jenkins, Lifetime based its adverse employment decisions on Conklin's evaluations of his performance. Jenkins argues that because Conklin allegedly lied about having an affair, and because Lifetime relied on Conklin's opinion of his performance, Lifetime's asserted non-discriminatory reason was pretextual. This argument lacks merit because even when viewed in the light most favorable to Jenkins, the fact that Conklin lied about having an affair does not imply that Miller did not honestly believe that Jenkins had performance problems. Furthermore, even if

Conklin's lie regarding the affair could support an inference that Conklin generally lacked credibility, this too would not establish pretext. *See EEOC v. Target Corp.*, 460 F.3d 946, 960 (7th Cir. 2006) (holding that allegations about an employer's lack of credibility, like Jenkins's vague assertion, "will not control"). Finally, Jenkins offers no evidence suggesting that Conklin's evaluation of him had any influence on the ultimate decision to discharge him. In fact, Jenkins does not dispute that Miller honestly believed that Jenkins was not performing his job adequately.

Jenkins also argues that Lifetime's reason for demoting and terminating his employment "shifted repeatedly" in Miller's interrogatories and deposition testimony and this suffices as evidence of pretext. *See Zaccagnini v. Chas. Levy Circulating Co.*, 338 F.3d 672, 676-77 (7th Cir. 2003). But Miller testified consistently that Jenkins had been demoted and terminated due to his lack of computer skills, failure to comply with company procedures, and failure to make appointments to sell close-outs. Because his answers were not inconsistent, this argument has no merit.

Finally, Jenkins offers Lifetime's statement to the Arkansas Unemployment Commission that "Jenkins performed as expected when assigned to Wal-Mart" as evidence that its reason for transferring him was pretextual. Jenkins, however, takes this statement out of context. The quoted text refers only to a question that asks, "Had the worker performed job duties satisfactorily in the past?" Throughout its answers, Lifetime stated that it transferred and eventually terminated Jenkins based on his "failure to meet minimum company requirements" and refusal to use

email. Read in context, this evidence is insufficient to establish that Lifetime's asserted non-discriminatory reason was dishonest.

Accordingly, we AFFIRM the judgment of the district court.

Filed 11/29/2006
05C7113
United States District Court,
Northern District of Illinois

Paul Jenkins, Jr.

vs.

Lifetime Hoan Corporation

***

STATEMENT

Plaintiff makes claims of age and sex discrimination against defendant, his former employer.

There is no direct evidence of discrimination. With respect to the indirect method, defendant states that its actions were for legitimate non-discriminatory reasons. According to defendant, plaintiff was leader of defendant's sales team for its Wal-Mart account. Defendant hired a consultant (a 59 year old male retiree) on whose recommendation Barbara Conklin was hired for that team, and based on whose recommendation it was concluded plaintiff did not have the required skill set for the team. He was first replaced as team leader by Conklin and then transferred out of the team because of a lack of computer skills, his being sales rather than business building oriented, his failure to prepare market share analyses or business plans, his failure to understand the store as a community, his lack of preparation for meetings, his failure to adapt, his being an order taker

and not a business planner, and his failure to adhere to Conklin's requests. Whether or not these were the best criteria by which to judge plaintiff's performance, they were certainly non-discriminatory ones. Plaintiff has not shown that these reasons for first his removal as team leader and later his move out of the team entirely were pretextual.

Plaintiff was moved to another sales position within the company. The evidence is he never made a sale or efforts to sell in that position. That was certainly a legitimate, non-discriminatory reason for terminating his employment. Plaintiff has not shown that this reason was pretextual.

Barbara Conklin had an affair with the buyer for Wal-Mart. The evidence is that defendant was at first unaware of the relationship and later was told by Conklin that it had ended before her employment by defendant. The evidence is defendant believed this to be the case. Subsequently, it turned out there was evidence the affair may have been ongoing, and Conklin ultimately was terminated by defendant.

Plaintiff insists that defendant must have known of the affair, and indeed hired Conklin because of it. There is no evidence of this. The strongest point plaintiff makes is that defendant should not have taken her word for the termination of the affair. However, defendant if convinced there was no ongoing affair was under no obligation to investigate further. The upshot of all this is, based on defendant's belief that the affair between Conklin and the Wal-Mart buyer had ended before her employment for defendant began, there can be no legitimate argument that she replaced plaintiff because

of her sexual relationship with Wal-Mart's buyer.

Accordingly, defendant's motion for summary judgment is granted.